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No. ____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FREDERICK P. ANDREWS and EDITH W. ANDREWS,
Petitioners,

v.

DISTRICT OF COLUMBIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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QUESTIONS PRESENTED

1. Whether the refusal of the District of Columbia Court of Appeals to hold that the District Government had no authority to tax persons on their income derived after they left the District to live in a city abroad, absent proof they always had a fixed and definite intent to return and make their home in the District again, was an egregious error of more than local importance.

2. Whether the District Government acted in bad faith in forcing petitioners to litigate the need for such proof in the face of this Court's early ruling on the procedure to be followed in determining District income tax liability where change in domicile is claimed.

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DISTRICT OF COLUMBIA,
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PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

PETITION

The petitioners Frederick P. Andrews and Edith W. Andrews respectfully pray that a writ of certiorari issue to review the judgment and opinion of the District of Columbia Court of Appeals entered in this proceeding on April 1, 1982.

OPINION BELOW

The opinion of the District of Columbia Court of Appeals, not yet reported, appears in the appendix hereto. No opinion was rendered by the Superior Court of the District of Columbia.

JURISDICTION

The judgment of the District of Columbia Court of Appeals was entered April 1, 1982. A timely petition for

rehearing was denied May 21, 1982, and this petition is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3) and D.C. Code (1981), § 11-102.

STATUTORY PROVISIONS INVOLVED

D.C. Code (1981), § 47.806.3(a):

> [T]here is hereby imposed on the taxable income of every resident a tax determined in accordance with the following table. . . .

D.C. Code (1981), § 47-801.4(17):

> The word "resident" means every individual domiciled within the District on the last day of the taxable year . . . and every other individual who maintains a place of abode within the District for more than 7 months of the taxable year, whether domiciled in the District or not. . . .

D.C. Code (1981), § 47-801.4(4):

> The word "individual" means all natural persons (other than fiduciaries) whether married or unmarried.

STATEMENT OF THE CASE

The origin of the controversy—This case arose out of respondent's denials on March 24, 1972, and May 25, 1972, of petitioners' claims under dates of March 2, 1972, and April 13, 1972, for refund of $1,813 in taxes levied on income derived during the first 21 months after petitioners left the District to live in Geneva, Switzerland (R. 323, 327, 332, 333). The refunds were denied on the basis of "determinations" that petitioners continued to be "resi-

dent," or "domiciled," or both, in the District until they "moved to Maryland" on August 13, 1971 (*id.*).[1]

Petitioners' District domicile and its background— Petitioners, Mr. and Mrs. Andrews, first came to the District in 1961 when they were 56 and 49 years of age, respectively (R. 582, 584). Mr. Andrews was a British citizen (R. 157-158), a furniture designer by profession (R. 171, 33), in poor health (R. 17, 25, 54-55), and financially dependent on his wife (R. 170-171). Mrs. Andrews was a United States citizen and an international labor economist (R. 582-585). During the early years of her career she was employed in Chicago, New York City, Meadville, Pennsylvania, and New York again. She entered the United States Foreign Service in 1941 and for 15 years served successively in Algiers, Rome, Copenhagen, New Delhi, and Madras (R. 584-585). She resigned in order to marry Mr. Andrews in 1956 (R. 53, 584). They lived in Madras until he suffered a serious illness and in 1958 they moved to Stratford on Avon, England (R. 134), for his convalescence (R. 54). In 1961 they moved to Washington and Mrs. Andrews took a position with the Bureau of Labor Statistics of the Department of Labor (R. 584). In 1964 they moved into a house on McKinley Street, N.W. (R. 14-16). After eight years with the B.L.S. and contemplating ultimate retirement abroad (R. 25, 33), Mrs. Andrews applied for a position with the International Labor Office in Geneva, Switzerland (R. 582-585). The Andrews hoped that she could work for a few more years during which she would build up a retirement annuity that would enable them to

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[1] Respondent has never explained the inconsistency of its determinations for the first and the last parts of 1971 (see Appellants' Br. filed May 11, 1981, p. 14; R.651).

finance a home for their retirement in Malta or a similar spot (R. 25, 28, 34-38). Under the Federal Employees International Organizations Service Act (5 U.S.C. §§ 3581-3585) she could continue to accrue her Civil Service retirement benefits, by making the appropriate periodic payments for that purpose through the Labor Department (R. 588-589, 81-82). When the ILO proposed a one-year contract, as was customary there, she was reluctant to accept it and sought assurance of longer service (R. 27-31; 582, line 19; 33-34). The ILO's formal offer of a one-year contract was accompanied by written (R. 586) and oral assurances of renewal, subject to the availability of funds (R. 28-31, 79).

Petitioners' stay abroad—Petitioners sold their McKinley Street house and their furniture (R. 33), Mrs. Andrews was "separated" from her B.L.S. employment effective November 15, 1969 (R. 587), they left Washington, and on November 17, 1969, she entered her position with the ILO (R. 590).

They had been living in Geneva only six months when the ILO became faced with a financial crisis resulting from the United States failure to pay its membership dues (R. 32, 100, 101) in protest of the ILO's granting observer's status to the Palestine Liberation Organization. Mrs. Andrews was led to believe that her one-year contract would nevertheless be renewed when it expired in November, 1970 (R. 102-104, 108-110). It was, but only for seven and a half months, to June 30, 1971 (R. 32, 590-591). She remained hopeful her contract would be extended again (R. 100-101) but by April of 1971 she "realized" she would have to look for a job in Washington (R. 89, 116).

Petitioners' return to the United States—Before leaving Geneva, the Andrews visited Cyprus, toured the

island, bought a piece of land there for their retirement home, and made preliminary arrangements for its construction (R. 37-38, 135). (The house was under construction three years later at the time of the trial and was expected to be completed in January 1974; they went there to live in 1974 (R. 510, 548.) They returned to the States from Geneva July 7, 1971, stayed a few days with Mrs. Andrews' brother in Fairfax, Virginia, and stayed a month in an apartment hotel in Washington while they continued looking for a place to live. At first undecided between Virginia and Maryland, they decided on Maryland (R. 71-72). They bought a house in Bethesda, Maryland, and moved into it on August 13, 1971, five and half weeks after they left Geneva (R. 13-14).

The trial court proceedings—Petitioners filed a timely petition in the Superior Court of the District of Columbia, Tax Division, praying "refund of $1,813, with interest, court costs, and reasonable attorney's fees" (R. 326). Respondent denied liability (R. 327) and the case was tried without a jury on April 16 and 17, 1973 (R. 210). Relying (R. 346-347) on *District of Columbia* v. *Murphy*[2] and *Pace* v. *District of Columbia*,[3] petitioners noted that "[t]he presumption of continuance of domicile of origin has given way to the presumption of domicile in the territory in which one is a resident until the contrary is demonstrated" (*Pace*, 77 U.S. App. D.C. at 334, 135 F.2d at 251).

When, after six years, respondent replied to petitioners' motion for decision by offering to settle for $1,813 and

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[2] 314 U.S. 441 (1941), hereinafter referred to as "*Murphy*."

[3] 77 U.S. App. D.C. 332, 135 F.2d 249 (1943), affirmed, 320 U.S. 698 (1944), hereinafter referred to as "*Pace*."

4% interest, but no attorneys' fees, court costs, or higher rate of interest (R. 602), petitioners opposed the offer (R. 604, 608) and filed a brief on the merits with requested findings (R. 624-627). Subsequently, in response to the court's declaration that it wanted all "these matters locked into one order" (R. 292), petitioners filed a motion for attorney's fees of $10,000 for services and expenditures (including court costs) and for interest at from 5.14% to 5.75%, and requested further findings (R. 674-696). Respondent filed a timely reply (R. 698-709). Six months later the court entered an order directing the refund of $1,813 with 4% interest and denying the other relief petitioners had sought (R. 717).

The proceedings on appeal.—On appeal the court below affirmed. Although it said that the *Murphy* presumption of domicile where one lives was applicable (Slip Op., *infra*, p. 7a), it held that petitioners, somehow, nevertheless bore the burden of establishing by evidence that they were domiciled in Geneva while living there (Slip. Op. *infra*, p. 8a). On that basis, it held that "[a] trial court could reasonably have concluded" from some evidence adduced at the trial "that [petitioners'] domicile was in the District . . ." (Slip Op., *infra*, p. 8a). Also, that "[s]ince [respondent] could have reasonably expected to prevail based on this testimony, the trial court could conclude that [respondent] did not act in bad faith in continuing defending the suit . . ." (Slip Op., *infra*, p. 9a). A timely petition for rehearing was denied. One member of the three judge panel dissented with a one-paragraph explanation (Slip Op., *infra*, p. 11a).

REASONS FOR GRANTING THE WRIT

The decision of the court below should be reviewed for a combination of independently sufficient reasons based on

the principles reflected in numerous exceptions to the Court's policy of deferring to the judgment of that court in matters of local law.[4]

I. The Decision Below Would Egregiously Pervert This Court's Ruling In *Murphy* With More Than Locally Important Impact

Referring to petitioners' argument that for District income tax purposes *Murphy* established the presumption that one is domiciled where one lives and that the burden of proving the contrary is on the party claiming otherwise, the court below held (Slip Op., *infra*, pp. 7a-8a):

> [Petitioners] are correct in their contention that "the place where a man lives is properly taken to be his domicile until facts adduced establish the contrary" [citing *Murphy* at 455], but they are wrong as to the burden of proof.

Petitioners had argued that to satisfy the qualification of the *Murphy* presumption ("until facts adduced establish the contrary"), facts must be adduced establishing a fixed

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[4] *Whalen* v. *United States*, 445 U.S. 684, 687-688 (1980);
Pernell v. *Southland Realty*, 416 U.S. 363, 367-369 (1974);
General Motors Corp. v. *District of Columbia*, 380 U.S. 553, 556-557 (1965);
Miller v. *United States*, 357 U.S. 301, 306 (1958);
District of Columbia v. *Thompson Co.*, 346 U.S. 100 (1953);
Griffin v. *United States*, 336 U.S. 704, 707-709, 715-716 (1949);
Fisher v. *United States*, 328 U.S. 463, 476-477 (1946);
District of Columbia v. *Pace*, 320 U.S. 698, 700 (1944);
District of Columbia v. *Murphy*, 314 U.S. 441, 449 (1941);
Loughran v. *Loughran*, 292 U.S. 216 (1934)
Washington Fidelity National Insurance Co. v. *Burton*, 287 U.S. 97 (1932)

and definite intent to return and make one's home in his former domicile (Appellants' Br. pp. 12-13).

A. *Murphy long ago provided a plain procedure for determining District income tax liability where change in domicile is claimed.*—The question that was addressed there had "long been a source of litigation in the courts of this jurisdiction"—a "problem" stemming from taxpayers' reliance on the presumption of continuity of a previously established domicile to escape the tax (*Alexander* v. *District of Columbia*, 370 A.2d 1327, 1329-1330 (D.C. App. 1977), hereinafter referred to as "*Alexander*").

In spite of the recognition of that problem in *Alexander*, the opinion of the court here manifests no understanding of the problem, or of its resolution by *Murphy*. There the Court had first clarified the meaning of "domicile," the "fulcrum" of liability to the District income tax (314 U.S. at 449, *et seq.*). It held that persons do not become domiciled here simply by coming here to live (314 U.S. at 454); they must, in addition, "have no fixed and definite intent to return to make their homes where they were formerly domiciled" (314 U.S. at 454-455). It pointed out the difficulties of determining domicile on consideration of the "indicia of where a man's home is and according to the established modes of proof" (314 U.S. at 455).

The Court then went on to establish a new procedure for settling that question for District tax purposes. It built on the traditional presumption of domicile where one lives (using the words quoted by the court below (*supra*, p. 7)). It made that presumption applicable to anyone "quartered" in the District on tax day (December 31),

even where domiciliary status might seem doubtful.[5] And, importantly, it did not leave that presumption open-ended. It spelled out the intent to return and make one's home in his previously established domicile that would have to be shown to overcome that presumption. Thus it defined what "the facts adduced" would have to show in order to "establish the contrary," within the meaning of the qualification of the Court's presumption. Moreover, by its own terms that condition could never be satisfied by reliance on the previously dominant continuity presumption, for it called for *facts* to be adduced. The Court specified that the intent must be "fixed and definite," and "unconditional," although the time may be "contingent" (314 U.S. at 454-455, n.9). An initial intent on first moving would not be enough; it must continue on tax day, and must never have wavered (314 U.S. at 456). Thus the problem arising from reliance on the continuity presumption was resolved by doing away with that presumption for the purpose of District income tax law where change is in issue. *Pace* (77 U.S. App. D.C. at 334, 135 F.2d at p. 251, n.5).

B. *The court below egregiously misconstrued the Murphy opinion, reintroducing and adding to the problem Murphy resolved.*—Despite its recognition of the applicability of the *Murphy* presumption in this case, the court below held that "it was [petitioners'] burden to prove that they had changed their domicile" (Slip Op., *infra*, pp. 7a-8a). That holding was expressly based on a single short sentence from a page in *Murphy* (314 U.S., at

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[5] "The taxing authority is warranted in treating as prima facie taxable anyone quartered in the District on tax day [December 31] whose status it seems doubtful" (314 U.S. at 445).

456) that the court otherwise disregarded (Slip Op., *infra*, p. 8a):

> If one has at any time become domiciled in the District it is his burden to establish any change of status upon which he relies to escape the tax.

It is true that, standing alone, the sentence does seem at first to support that holding. But the opinion in *Murphy* had just pointed out that a person's intent on first coming to the District might subsequently have gradually "withered" and "finally dissipated." The sentence in question clarified the status of such a person whose intention later revives, and defined the limit to the presumption, i.e., such a person cannot, merely by changing his mind, revive the presumption that has become *functus officio*. Moreover, properly read, the sentence is part of the premise for the conclusion in the following sentence: that to escape taxation where he lives "one who comes to the District . . . [must] *always* have a fixed and definite intent to return and take up his home" where he was formerly domiciled (*Murphy*, *id.*, emphasis supplied).

The implication by the quotations that follow in that paragraph (Slip. Op., *infra*, pp. 7a-8a) is wholly illusory. The first, about the complexities of determining domicile, is from this Court's description of the problem it addressed in *Murphy*, not its resolution of that problem (*supra*, p. 8). The court's second quotation is a repetition of a confusing and misleading reference in *Alexander* to the *lack* of intent to return to a former home as though that must be proved by a person who has moved, to

establish that he is domiciled in his new location.[6] The third quotation is from a part of the legislative history of the District income tax act that is referred to in the *Murphy* opinion, not the Court's ruling.

Moreover, while giving this perverted lip service to the *Murphy* presumption, the court below accorded that presumption no legal effect in reaching its decision, and wholly ignored *Murphy's* requirement of the facts that must be adduced to overcome it. The court pointed to no evidence that petitioners ever intended to make their home in the District again, and respondent did not deny that there is no such evidence.[7] It is only reasonable to conclude that the court below simply adopted respon-

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[6] In *Alexander* the reference appears to have been *obiter dictum*, unnecessary to its holding that appellant there *was* domiciled where he lived, in Japan. For nothing in that opinion indicates any rejection of his contention "that the evidence in the record shows that the requisite intent of returning to this jurisdiction and resuming his domicile here was completely lacking" (370 A.2d at 1329).

[7] The testimony to which the court refers (Slip Op., *infra*, pp. 8a-9a) indicates at most a *conditional* intent to return to seek employment in Washington *if* need for employment should make that necessary. The court ignored petitioners' uncontroverted contention (Appellants' Br. p. 11) that there was nothing in the record to provide any nexus between employment in Washington and making their home there. It overlooked that they had sold their house here, their furniture, and "cleared everything" (R.33); that before leaving Geneva they bought a site for their retirement home in Cyprus and made preliminary arrangements for its construction, which was under way at the time of the trial (R. 37-39); that when they actually did return to the United States on July 6, 1971 Mrs. Andrews found employment in Washington, and within 38 days of their return they had bought a house in Bethesda, Maryland, and taken up residence there without considering looking for a house in the District (R. 13-14, 71-72).

dent's reliance on the continuity presumption,[8] thereby reintroducing the problem resolved in *Murphy* (*supra*, p. 8).

The egregiousness of this perversion of *Murphy* is compounded by the confusion it adds to the confusion that prevailed before *Murphy*. If this decision were to stand, *Murphy* would simply not be "the law" in the District for persons who leave to live abroad. Moreover, it would not be "the law" for persons who leave the District to live in another State whenever the District Government concludes that it will be "cost-effective" to "tax" such persons.

That prospect means that, insofar as the non-local impact of the decisions reviewed in *Murphy* and of the decision sought to be reviewed here is a factor in granting *certiorari*, the reason for granting the writ here is at least as great as it was there. The decision of the court below upholds the District Government's use of its color of taxing authority, where it has none under *Murphy*, to extort "taxes" from persons for whom it provides none of the benefits enjoyed by those who live here, or have a place of abode here for part of a year, or work here, own real estate here, or visit here. *Cf. Loughran* v. *Loughran*, 292 U.S. 216 (1934). Moreover, it upholds "taxing" such persons on income derived, not merely in part from outside the District, as in *General Motors Corp.* v. *District of Columbia*, 380 U.S. 553, 556-557 (1965), but derived almost entirely from outside the District.

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[8] Respondent had contended (Appellees' Br., p. 14): "Under the normal rule governing domicile [petitioners'] domicile continued to be where it had been established until they established another."

C. *Petitioners' constitutional contentions were given inadequate consideration by the court below.*— Petitioners claimed that respondent's practice of taxing persons who leave the District to live abroad, but not those who leave to live in another state, was discriminatory, that such discrimination could not be justified, and that it denied petitioners equal protection of the law, in violation of the due process clause of the Fifth Amendment, citing *Bolling* v. *Sharpe*, 347 U.S. 497 (1954) (Appellants' Br. pp. 27-28). Respondent had not controverted that contention. But the court below held that petitioners could not properly raise the question, "[h]aving failed to raise the issue in the trial court. . . ." In their petition for rehearing (p. 8) petitioners pointed out that in the trial court their brief had called attention to the discrimination and had contended that "intentional misuse of taxcollection powers is the essence of unconstitutionality" (R. 651, n.1). Disregarding the contention, the court below denied rehearing.

Petitioners also claimed that restitution for respondent's bad faith (*infra*, p. 5a) should include interest at 5.14% and 5.75% (R. 684-687) instead of the 4% respondent had conceded (Appellants' Br., pp. 26-27). The decision below (Slip Op., *infra*, p. 10a) found "this contention meritless," citing *Rosewell* v. *LaSalle National Bank*, 450 U.S. 503 (1981), as an example of cases that have deemed "refunding taxes with *no* interest . . . adequate relief for an aggrieved taxpayer. . . ." Petitioners pointed out in their petition for rehearing (pp. 7-8) that in reversing the Seventh Circuit's decision holding such a state statute unconstitutional, this Court had done so on the ground that the district court had no jurisdiction under the Tax Injunction Act, 28 U.S.C. § 1341, and had stated (450 U.S. at 515) that it "expressed no opinion" on the

constitutionality question. The denial of rehearing by the court below ignores its patent error.

A decision of the District of Columbia Court of Appeals that thus encroaches on petitioners' constitutional rights does not command deference by this Court as a matter of policy. *Whalen* v. *United States*, 445 U.S. 684, 687-688 (1980).

II. Denial Of Restitution For Respondent's Bad Faith In Forcing Relitigation Of The *Murphy* and *Pace* Rulings Was Egregious Error Of More Than Local Importance

The opinion below first predicated its denial of claims for restitution for respondent's bad faith on the testimony it held sufficient under its misreading of the *Murphy* opinion to establish petitioners' liability to the District's "taxes" (Slip Op., *infra*, p. 9a):

> Since [respondent] could have reasonably expected to prevail based on this testimony, the trial court could conclude that the respondent did not act in bad faith in continuing defending this suit.

This absolution of bad faith adds to the importance of review of the error of the court's misreading of *Murphy*. And then the court digresses (Slip Op., *infra*, p. 9a) in a discussion that would trivialize the charge of bad faith by treating it as a matter of *counsel's* "conduct"—of whose counsel's positions had been principally responsible for the delay in reaching a decision in the trial court (regardless of the validity and reasonableness of the positions taken on behalf of petitioners). After that digression the opinion below returned to the real question of bad faith in the first part of this self-contradictory statement (Slip Op., *infra*, p. 10a):

> Its conduct did not force [petitioners] to seek judicial aid for a right that was clear, defined and estab-

> lished; in fact the merits of the case have never been adjudicated.

In this statement the court below patently adopted respondent's contention (*supra*, pp. 11-12) that it had not been guilty of bad faith (although it had not adduced the facts required to overcome the *Murphy* presumption) because, respondent argued, *Murphy* permitted it to rely on the continuity presumption and thus did not provide a "plain rule" for decision. By this holding that *Murphy* did not provide a plain rule, the court below bootstraps the anomalous result that respondent could violate *Murphy* with impunity. The statement itself adjudicates the merits (adversely to petitioners) of their claim to be conclusively presumed, on this record, to be domiciled in Geneva, and on that basis holds respondent not liable for attorney's fees, etc. That adjudication makes it meaningless to say that "the merits of this case have never been adjudicated," even if the court meant by that, never adjudicated for the purpose of determining liability to make the refund with 4% interest, that respondent had conceded.

Where, as here, the respondent could not overcome the *Murphy* presumption, the real charge of bad faith cannot be so handily brushed off. Respondent's relitigation of the question that had been decided in *Murphy* and *Pace* in order to defend its unauthorized "tax" and thereby fortify its illegal source of revenue was calculated bad faith (*infra*, pp. 16-18). See *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 247, 258-260 (1975); *Berens Sales Co.* v. *McKinney*, 310 A.2d 601, 603, n.5 (D.C. App. 1973); *Kahan* v. *Rosenstiel*, 424 F.2d 161, 167 (3rd Cir. 1970), *certiorari denied sub nom. Glenn Alden Corp.* v. *Kahan*, 398 U.S. 950 (1970). The opinion of the court below in *Berens Sales Co.* v. *McKinney (supra)*,

should have been sufficient in District courts, for there the court had been explicit on the bad faith of relitigating a decided question of law:

> We note that if appellant henceforth were to initiate a possessory action against other tenants who tender their rent in full but with a notation of protest then such litigation in the face of the trial court's decision in this case might well be deemed "vexatious, wanton or oppressive" and, accordingly, . . . constitute an exception to the general rule against allowance of counsel fees to the successful party. See *Shull* v. *Columbus Municipal Separate School District*, *supra*, 338 F. Supp. at 1378. . . .

Moreover, where it is the Government itself that is defying the limit on its powers resulting from the law plainly laid down in an admittedly applicable and controlling judicial decision, and where its victims are of a class of persons who are not likely to be able to avail themselves of judicial aid, the oppressiveness of the Government's conduct accentuates the need for the courts' exercise of their inherent equity powers. See *Hutto* v. *Finney*, 437 U.S. 678, 689 n.14 (1978); *Vaughn* v. *Atkinson*, 369 U.S. 527, 530 (1962); *cf. Bradley* v. *School Board of City of Richmond*, 472 F.2d 318, 327 (4th Cir.), reversed on other grounds, 416 U.S. 696 (1974); *Rolax* v. *Atlantic Coast Line R. Co.*, 186 F.2d 473, 481 (4th Cir. 1951).

In a pretense of a bona fide defense of its unauthorized "tax," respondent relied on the continuity presumption, although it had been told in *Pace*, 77 U.S. App. D.C. at 234, 135 F.2d at 251, that that presumption had "given way" to the *Murphy* presumption. It tacitly admitted as much. For when petitioners pointed out in oral argument in the trial court that respondent had no evidence to satisfy the *Murphy* requirement of proof for overcoming its presumption (R. 262-263, 267-269, *infra*, pp. 19a-22a)

respondent countered with the following revealing, self-conscious evasion (R. 278, *infra*, p. 22a, italics and punctuation supplied):

> And I may say for the Court that the issue—*that in terms of the issue the Government has always pursued* [—]wasn't whether there was intent to leave Switzerland to come back, it was always our *defense* that the Andrews never abandoned their domicile that they had here. * * *
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> * * *
>
> [T]hat is the only thing that can be done, the only tactic that we can take in this case.

The motivation for such persistent "pursuit" of that false issue had emerged in an earlier oral argument after petitioners indicated some considerations governing use of the record of the 1973 trial, where there had been no showing of the required intent (R. 221-222, *infra*, pp. 15a-16a). In opposing use of that record, respondent argued for a new trial, to be held in Cyprus for the ostensible purpose of taking petitioners' testimony. In support of that proposal respondent unabashedly disclosed that it intended to continue its defense of this case and others like it, despite the adverse decision in *Alexander* eleven months earlier; that it had reason to believe that an association of State Department employees would defray the unusual expense such a trial in Cyprus would cause petitioners to incur, because of its members' special interest in the outcome of this case; and that other costs of such a trial would be more than offset by "hundreds of thousands of dollars" of savings in expenses of the litigation respondent expected from its continuance of such "taxes," if it lost this case (R. 228, 230-234, *infra*, pp. 16a-18a). And two years later, when it belatedly sought to get free from this case by offering full refund with 4% interest, it stipulated (R. 602) that it did "not for the

purposes of this case or any case which may be brought in the future, waive any of its rights, defenses, determinations or authority previously asserted in this case."

Petitioners protested (R. 608-622) that the practical effect of adoption of that proposal would be judicial license for respondent to continue such "taxation" and, by denying costs, reasonable interest, and attorney's fees, to put a protective ceiling on the financial liability respondent would risk in any litigation that might result—at less than it had suffered in *Alexander* where the prevailing party was awarded costs.[9]

The trial court granted respondent substantially the license its limited concession contemplated and the court below affirmed. Such a decision by the highest court of the District of Columbia, so crassly condoning governmental defiance of reiterated judicial rulings in cases to which respondent was a party, is in conflict with any responsible conception of public policy and sound administration of law. This Court should review this case to see that its ruling in *Murphy* (314 U.S. at 355-356), and that of the United States Court of Appeals for the District of Columbia in *Pace* (77 U.S.App.D.C. at 634, 135 F.2d at 251), are observed by the Government and courts of the District. *District of Columbia* v. *Thompson Co.*, 346 U.S. 100 (1953); *Loughran* v. *Loughran*, 292 U.S. 216 (1934). As Mr. Justice Murphy said, dissenting in *Fisher* v. *United States*, 328 U.S. 463, 490 (1946):

> The rule that this Court ordinarily will refrain from reviewing decisions dealing with matters of local law in the District of Columbia is a sound and necessary

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[9] *Alexander* v. *District of Columbia* (unreported), Sup. Ct. D.C., No. 2187, Judgment entered May 6, 1977.

one. But it is not to be applied without discretion. Like most rules, this one has its exceptions. And those exceptions are grounded primarily in considerations of public policy and sound administration of justice.

CONCLUSION

For the foregoing reasons petitioners submit that a writ of certiorari should be granted.

Respectfully submitted,

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